

FEDERAL CIRCUIT COURT OF AUSTRALIA

*BMK18 v MINISTER FOR HOME AFFAIRS &
ANOR*

[2018] FCCA 2092

Catchwords:

MIGRATION – Application to quash decision of Administrative Appeals Tribunal – where Applicant relied on bogus document to establish identity – where no jurisdictional error was established – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5, 91WA, 95A, 447

Cases cited:

BGM16 v Minister for Immigration and Border Protection & Anor [2017] 252 FCR 97

Applicant:	BMK18
First Respondent:	MINISTER FOR HOME AFFAIRS
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 841 of 2018
Judgment of:	Judge Egan
Hearing date:	1 August 2018
Date of Last Submission:	1 August 2018
Delivered at:	Sydney
Delivered on:	1 August 2018

REPRESENTATION

Solicitors for the Applicant: Michael Jones Solicitor

Solicitors for the Respondents: Australian Government Solicitor

THE COURT ORDERS ON A FINAL BASIS:

- (1) That the application be dismissed.
- (2) That the applicant pay the first respondent's costs fixed in the sum of \$7,328.
- (3)
- (4)
- (5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 841 of 2018

BMK18

Applicant

And

MINISTER FOR HOME AFFAIRS

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. The applicant in this matter is a citizen of Bangladesh. He seeks judicial review of a decision of the Administrative Appeals Tribunal (“the Tribunal”) handed down on 28 February 2018. The application for review was lodged on 27 March 2018, within the relevant time limit as stipulated in section 447(1) of the *Migration Act 1958* (Cth) (“the Act”).
2. The relevant background to this matter is that the applicant applied for a protection visa on 20 June 2014. At the time of his making that application, the applicant submitted an application form which indicated that his date of birth was 10 June 1990. Also accompanying that application for a protection visa was a document which purported to be a duly issued Bangladeshi passport. The passport appears on

pages 51 and 52 of the Court book. It can be seen on page 52, that the date of birth recorded on the passport for the applicant was 1 January 1977.

3. Section 91WA of the *Migration Act 1958* provides as follows:

91WA Providing bogus documents or destroying identity documents

(1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:

(a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or

(b) the Minister is satisfied that the applicant:

(i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or

(ii) has caused such documentary evidence to be destroyed or disposed of.

(2) Subsection (1) does not apply if the Minister is satisfied that the applicant:

(a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and

(b) either:

(i) provides documentary evidence of his or her identity, nationality or citizenship; or

(ii) has taken reasonable steps to provide such evidence.

(3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

4. When first interviewed by a departmental officer in respect of the protection-visa application, the obvious discrepancy between the date of birth as recorded on the applicant's submitted passport to his age-appropriate appearance was stark. As it transpired, it was conceded by Mr Jones, who appeared on behalf of the applicant, that the relevant passport was obtained by the applicant in Bangladesh as part of a criminal conspiracy designed to enable the applicant to have issued to him a false passport.
5. As to the most obvious falsehood in the passport -namely the applicant's date of birth being recorded as 1977 instead of 1990 - Mr Jones on behalf of the applicant made the following concessions in relation to the passport submitted by the applicant in respect of his application for a protection visa, namely:
 - a) that the passport had been procured in Bangladesh by the applicant by deception. By necessary implication, therefore, the passport was an unlawfully issued and obtained passport in Bangladesh.
 - b) that the passport was a bogus document within the meaning of that term as defined in section 5 of the Act, particularly in the sense that it was obtained because of a false or misleading statement.
6. It is clear that the false or misleading statement which was relevant to the issue of the passport in this case was the false statement as to the date of the applicant's birth, a statement which, by reason of the criminal conspiracy entered into by the applicant, was made knowingly by him with that false or misleading statement included in the passport. The passport also is, arguably, a counterfeit which has been altered by a person who does not have authority to do so, as countenanced by subparagraph (b) of section 5 of the definition of "bogus document".
7. As to the passport document itself, Mr Jones on behalf of the applicant also conceded that the document:
 - a) is a Bangladeshi passport.
 - b) has a photograph confirming the applicant's identity.

- c) constituted evidence of the applicant's citizenship and nationality.
 - d) confirms the fact of the applicant's name.
- 8. It was further conceded on behalf of the applicant by Mr Jones that:
 - a) photographic identity is distinct and different from one's date of birth/age.
 - b)) nationality is distinct and different from one's age.
 - c) citizenship is distinct and different from one's age.
- 9. It was argued on behalf of the applicant that this particular case falls within the ambit of the decision of the Full Court of the Federal Court of Australia in *BGM16 v Minister for Immigration and Border Protection & Anor* [2017] 252 FCR 97. Reliance was placed upon the judgment of Sipsos J in that case at paragraphs 7 and 8. It was submitted that his Honour held that only where conduct on the part of an applicant prevented or hindered the Minister from determining the true identity, nationality or citizenship of the applicant would the applicant fall foul of the provisions of section 91WA of the Act.
- 10. However, as is clear from paragraphs 22, 23 and 24 of the joint judgment of Mortimer and Wigney JJ, the Court was there dealing with an entirely different factual situation to that which is presently before this Court. The applicant in that case entered Australia on false Greek passport documentation, but at the time of the application made by him for a protection visa, he relied on his actual correct Albanian documentation which correctly recorded his identity, nationality and citizenship.
- 11. In the case before me, it could not be said that the bogus document submitted by the applicant at the time he made application for a protection visa was a document which evidenced the applicant's identity, nationality or citizenship because, firstly, it was a bogus document, and secondly, it was a document which did not, by reason of its incorrect recording of the applicant's birth date, correctly record the applicant's identity. In any event, there is no doubt that the applicant provided the bogus passport for the purpose of establishing his nationality and citizenship as a Bangladeshi.

12. In those circumstances, the Minister was required to refuse to grant a protection visa to the applicant, and there has been no jurisdictional error demonstrated by reason of the refusal of either the delegate or the Tribunal to grant to the applicant a protection visa in that regard.
13. The fact that the applicant supplied a birth certificate did not assist him, as found by the tribunal in its reasons at [53] – [66] (CB 556 – 558). In any event, the date of 8 June 1990 recorded on the purported birth certificate was a different date to that recorded by the applicant as his date of birth on the protection visa application form, namely 10 June 1990. Further, the tribunal then properly addressed the question of whether the applicant had provided a reasonable explanation for providing a bogus document at [67] – [89] of its reasons (CB 559 – 565) before finding that he had not done so.
14. Accordingly, I dismiss the application for review. Mr Jones properly conceded that should I do so, his second ground of the application was no longer tenable.

I certify that the preceding fourteen (14) paragraphs are a true copy of the reasons for judgment of Judge Egan

Date: 21 August 2018